

## DELIMITING THE DOCTRINE: AN ARGUMENT AGAINST BASIC STRUCTURE REVIEW OF ORDINARY LAWS

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GOVINDA ASAWA<sup>1</sup> & PARTHIV JOSHI<sup>2</sup>

*The Basic Structure Doctrine, which was crafted to preserve the enduring identity of the Constitution, finds itself in an identity crisis in the fifty years of its existence. One prominent debate regarding the doctrine concerns its applicability to challenges against ordinary legislation. The judicial history in this regard is marred by conflicting opinions that add more to the debate than they resolve. This essay undertakes a comprehensive analysis of all the significant developments on the key issue of the scope and extent of the doctrine and attempts to harmonise them piece by piece. It has been observed that courts have, at times, readily extended the doctrine in testing the validity of ordinary legislation by construing the basic structure as nothing more than an interpretation emergent from a multi-provisional reading of the Constitution. Such an approach fails to appreciate the 'identity of the doctrine' and the 'method of identification of basic features' as two independent concepts. The invocation of the doctrine is not sine qua non for testing ordinary legislation based on 'principles' emerging from a multi-provisional interpretation of the Constitution. The sanctitude of the doctrine's identity lies in its operation in the sphere of constitutional amendments only, and the same must be preserved.*

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<sup>1</sup> Govinda Asawa is a fifth-year student at Gujarat National Law University, Gandhinagar. The author may be reached at <govinda.asawa@gmail.com>.

<sup>2</sup> Parthiv Joshi is a fifth-year student at Gujarat National Law University, Gandhinagar. The author may be reached at <parthiv.joshi.gnlu@gmail.com>.

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## INTRODUCTION TO THE ENDURING DEBATE

The Basic Structure Doctrine (“**the Doctrine**”), a crown jewel of Indian constitutional law, continues to invite extensive contemporary scholarship. Even though it was crystallised in the sixties and seventies, it remains a topic of debate in twenty-first-century scholarship as well. The Judiciary, championing constitutionalism, and the Parliament, with its political aspirations, have found one another at a crossroads since antiquity. These tensions between the two organs of the state eternalise the need for a harmonising thread – that holds both of them together in times of prosperity as well as turmoil. The mammoth exercise of crafting such a thread was taken up by thirteen judges of the Apex Court, assisted by many legal stalwarts with the likes of Shri N.A. Palkhiwala and Shri H.M. Seervai, when they convened to decide the fate of Edneer Mutt, where His Holiness Kesavananda Bharati had brought the State of Kerala to court over its attempt to acquire Mutt land. While the contours of the story of what followed have been narrated time and again, this version attempts to contextualise the Doctrine’s identity to better appreciate its scope and extent, particularly its extension to testing the validity of ordinary legislation as opposed to its traditional application to test constitutional amendments.

The *first* section of this essay delineates the ‘identity’ of the Doctrine as a limitation on the constituent power of the Parliament. It is essential to appreciate the issues that led to the genesis of such a doctrine. It is observed that the non-obstante clause inserted in Art. 368 of the Constitution *vide* 24<sup>th</sup> Amendment,<sup>3</sup> effectively ousting the then prevailing types of judicial review based on provisions of the Constitution, prompted the Court to devise this new form of judicial review. The *second* section of this essay is devoted to the key issue of the Doctrine’s scope and extent, that is, the applicability of the basic structure review in challenges to ordinary legislation enacted by the Parliament or the Legislatures of the States in the exercise of the legislative powers conferred by Art. 245 of the Constitution. Various decisions of the Apex Court that offer insights regarding the said issue are critically examined in this section. The *third* section of this essay

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<sup>3</sup> INDIA CONST. art. 368, *amended by* The Constitution (Twenty-fourth Amendment) Act, 1976.

turns to a series of judgements pertaining to the independence of judiciary and tribunalisation, which have been rendered one after the other like a string of pearls, leading to a new ‘identity’ of the Doctrine. The *fourth* section of this essay argues that the recent judicial trend of moulding a secondary identity of the Doctrine is not based on convincing grounds and should be avoided, for it takes away the essence of the Doctrine’s ‘identity’ as it was construed in *Kesavananda*.<sup>4</sup> It is concluded that an alternative approach to harmonise the recent judicial understanding and the concerns over dilution of the Doctrine’s identity lies in appreciating the ‘identity’ of the Doctrine and the ‘process of identification’ of the basic features as two independent concepts, whereby invocation of the former is not *sine qua non* for application of the latter, which may be construed as principles emergent from multi-provisional interpretations of the Constitution.

## THE IDENTITY OF THE DOCTRINE

*“Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But, the Constitution is a precious heritage; therefore you cannot destroy its identity”*<sup>5</sup>

This section sets the tone of the essay by investigating the background and the reasons that compelled the 13-judge bench in *Kesavananda* to devise the Doctrine. The origins and purpose of the Doctrine’s emergence play a significant role in identifying the ‘identity’ of the Doctrine.

To begin on a simple note, the majority in *Kesavananda* ruled that although there are no implied limitations flowing from normative constitutional theory that restrict the powers of the Parliament to amend the Constitution, they cannot be exercised so as to destroy or damage the ‘basic features’ or the ‘basic structure’ of the Constitution.<sup>6</sup> Such a ruling is the culmination of a series of tussles between the Parliament and the Judiciary over the interpretation of Art. 368 of the Constitution. The debate centres on the scope of judicial review of constitutional amendments and essentially asks whether constitutional amendments fall under the

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<sup>4</sup> *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

<sup>5</sup> *Minerva Mills Ltd. and Ors. v. Union of India and Ors.*, (1980) 3 SCC 625, ¶ 16.

<sup>6</sup> SUDHIR KRISHNASWAMY, *DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE*, at 26 (Oxford University Press, 2nd ed., 2011).

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definition of ‘law’ as defined in Art. 13(3)(a)<sup>7</sup> of the Constitution. The story ostensibly begins with *Shankari Prasad*,<sup>8</sup> when the Supreme Court held that a constitutional amendment is not a ‘law’ under Art. 13 and thus, not amenable to judicial review for abridging Part III rights. Although this view was affirmed in *Sajjan Singh*,<sup>9</sup> J.R. Mudholkar J. in his concurring opinion, first introduced the idea of ‘basic features’ by referring to the *Fazlul Quader Chowdhry*<sup>10</sup> judgement of the Supreme Court of Pakistan.<sup>11</sup> He indicated that there may be certain features of the Constitution that can limit the amending power of the Parliament. However, he left the discussion open and drew no conclusions. Subsequently, the Supreme Court in *Golaknath*<sup>12</sup> observed that the marginal heading of the Art. 368, as it then stood, merely prescribed the ‘procedure’ for amendment and the substantive powers flowed only from Articles 245, 246, and 248 of the Constitution.<sup>13</sup> Consequently, previous decisions were overruled, establishing that an amendment is ‘law’ within the meaning of Art. 13 of the Constitution and thus amenable to judicial review.

This prompted the Parliament to pass the 24<sup>th</sup> Amendment,<sup>14</sup> which significantly altered Art. 368 of the Constitution. The marginal heading was changed to denote the ‘power’ of amendment.<sup>15</sup> A non-obstante clause was inserted<sup>16</sup> *vide* clause (1) and Part III judicial review was expressly ousted *vide* clause (3) of Article 368<sup>17</sup> with a corresponding amendment in Article 13 as well.<sup>18</sup> Effectively, the amendment gave unfettered powers to the Parliament to amend any part of the Constitution including Part III, while immunising such actions from the traditional forms of judicial review. This

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<sup>7</sup> INDIA CONST. art. 13, cl. 3 (a).

<sup>8</sup> *Shankari Prasad Singh Deo v. Union of India*, (1951) SCC 966.

<sup>9</sup> *Sajjan Singh v. State of Rajasthan*, AIR (1965) SC 845.

<sup>10</sup> *Mr. Fazlul Quader Chowdhry v. Mr. Mohd. Abdul Haque*, (1963) PLD SC 486.

<sup>11</sup> *Id.* ¶ 57.

<sup>12</sup> *Golak Nath v. State of Punjab*, AIR (1967) SC 1643.

<sup>13</sup> *Id.* ¶ 53.

<sup>14</sup> INDIA CONST. art. 368, *amended by* The Constitution (Twenty-fourth Amendment) Act, 1976.

<sup>15</sup> *Id.* at art. 3(a).

<sup>16</sup> *Id.* at art. 3(b).

<sup>17</sup> *Id.* at art. 3(d).

<sup>18</sup> *Id.* at art. 2.

amendment fell for consideration in *Kesavananda*, where the Court construed the scope and extent of the newly recognised constituent power. While the majority upheld the 24<sup>th</sup> Amendment, they devised the Doctrine, intended to ensure that the powers conferred upon the Parliament are not exercised to alter the Constitution's fundamental foundation.<sup>19</sup> S.M. Sikri J. observed that the basic foundation cannot be destroyed by any form of amendment.<sup>20</sup> In effect, the constituent power of the Parliament was subjected to a novel form of judicial review. Such a 'basic structure' review ensured that the most fundamental or basic features of the Constitution were not damaged or destroyed in the exercise of the untrammelled constituent powers. The scope of this operation defines the 'identity' of the Doctrine. The peculiar historical context in which the Doctrine emerged also sets apart this newly evolved form of judicial review from other traditional forms. Therefore, the 'identity' of the Doctrine is distinctly characterised by its application to the constituent powers of the Parliament exclusively.

### **EXTENDING THE DOCTRINE TO TEST ORDINARY LEGISLATION: THE INITIAL POSITION**

Although the Doctrine was originally constructed to test the validity of constitutional amendments in *Kesavananda*, numerous attempts have since been made to extend its applicability to test ordinary legislation enacted by the Parliament or State Legislatures, in the exercise of the legislative powers conferred by Article 245<sup>21</sup> read with Art. 246<sup>22</sup> of the Constitution. At the outset, it is pertinent to frame two points of consideration – the 'Why' and the 'How'. The 'Why' examines the purpose of such an extension and its consequential advantages (or drawbacks). The 'How' explores the manner of articulation of the Doctrine so as to make it suitable for limiting a kind of power (legislative, as opposed to the constituent) — for which it was not originally designed. Before engaging with the relevant judgements of the Supreme Court, it would be useful to consider other recognised forms of judicial review concerning the exercise of legislative powers.

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<sup>19</sup> N.A. Palkhivala, *Fundamental Rights Case: Comment*, 4 SCC JOURNAL 57, (1973).

<sup>20</sup> *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225, ¶ 293.

<sup>21</sup> INDIA CONST. art. 245.

<sup>22</sup> INDIA CONST. art. 246.

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### A. JUDICIAL REVIEW OF LEGISLATIVE POWERS

The legislative powers of the Parliament and the State Legislatures i.e., the ordinary law-making powers, are delineated in Articles 245<sup>23</sup> and 246<sup>24</sup> of the Constitution. Whereas Art. 245 of the Constitution, in first impression, provides for territoriality of ordinary laws and Art. 246 of the Constitution provides for subject-matter division; three aspects of judicial review may be culled out, termed as 'Legislative Competence' Review. *First*, review of compliance with other provisions of the Constitution in as much Art. 245<sup>25</sup> begins with a subjection clause; *second*, a review of territorial operation; and *third*, a review of the subject matter of enactment being in accordance with the heads of legislation in Schedule VII<sup>26</sup> of the Constitution. Another kind of judicial review is provided under Art. 13 of the Constitution,<sup>27</sup> which may be termed a 'Part III compliance' review. It provides that no law (including any ordinary legislation) can be made in violation of Part III of the Constitution.<sup>28</sup> As such, the Indian Constitution places only two restrictions on the ordinary law-making power of the Parliament, namely lack of legislative competence and violation of fundamental rights. There is no third ground.<sup>29</sup>

Therefore, there exists a well-established distinction between the judicial review of ordinary legislative power, which is expressly provided in the Constitution itself, and the judicial review of an otherwise unfettered constituent power, which was developed as a necessary measure in *Kesavananda*. In the backdrop of this understanding, the following section analyses the approach of the judiciary to the key issue of expansion of the Doctrine in the twentieth century. Whereas the decisions directly addressing the key issue are analysed in the first part; the decisions indirectly involving the key issue, such as instances where the Doctrine was

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<sup>23</sup> INDIA CONST. art. 245.

<sup>24</sup> INDIA CONST. art. 246.

<sup>25</sup> INDIA CONST. art. 245.

<sup>26</sup> INDIA CONST. sch. VII.

<sup>27</sup> INDIA CONST. art. 13.

<sup>28</sup> INDIA CONST. art. 13, cl. 2.

<sup>29</sup> *State of A.P. v. McDowell & Co.*, (1996) 3 SCC 709.

directly applied to ordinary laws without considering the question of extension in the first place, are critically examined in the second part.

## **B. PART 1: EARLY DEBATES**

The early phase of development comprises two decisions of the Supreme Court, rendered proximate in time to one another. The period immediately succeeding *Kesavananda*, precisely the seventies and eighties, witnessed rigorous investigation into various facets of the newly evolved doctrine. The myriad socio-political circumstances, such as the electoral malpractices issue of Indira Gandhi, corruption allegations against the Karnataka Chief Minister, etc., that emerged in the said period transformed into politico-legal issues involving fundamental questions of constitutional law upon reaching the gates of the Apex Court. However, the scope of this part is limited to examining the decisions where the key issue was specifically considered at length, enabling us to assert the initial position distinctively.

### **The *Election* case**

*“The concept of a basic structure as brooding omnipresence in the sky apart from the specific provisions of the Constitution is too vague and indefinite to provide a yardstick to determine the validity of an ordinary law.”*<sup>30</sup>

The Doctrine was revisited for the first time post-*Kesavananda* in the matter of *Indira Nehru Gandhi v. Raj Narain*,<sup>31</sup> popularly known as the *Election* case of 1975. For this reason, it deserves a detailed examination. Along with the challenge to clause (4) of Art. 329A of the Constitution, inserted vide the 39<sup>th</sup> Amendment,<sup>32</sup> the validity of the Representation of the People (Amendment) Act, 1974 and the Election Laws (Amendment) Act, 1975 was also assailed on the grounds that they destroyed the basic structure. The 5-Judge Bench, while considering *Kesavananda* to be a binding precedent, proceeded to consider the key issue of extension of the Doctrine in the following terms.

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<sup>30</sup> *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1, ¶ 357.

<sup>31</sup> *Id.*

<sup>32</sup> INDIA CONST. art. 329A, cl. 4, *amended by* The Constitution (Twenty-fourth Amendment) Act, 1976.

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AN Ray, CJ. expressly rejected such an extension, arguing that it would equate constituent powers with legislative powers.<sup>33</sup> This is better understood along the lines of Kelsen's Hierarchy of Norms,<sup>34</sup> which theorises a hierarchical legal order where one legal norm draws its validity from a higher legal norm and this regression continues till a basic self-validating basic norm is reached.<sup>35</sup> In a similar vein, Ray C.J. appears to suggest that while the Doctrine, controls amendments to the *Grundnorm*, it does not extend direct control over the enactment of general legal norms, which are governed by the *Grundnorm* itself as this would break the sequential chain of regression. He further observes, that in view of the specific restrictions on the plenary legislative powers set forth in Articles 245 and 246 of the Constitution, accepting the extension would amount to “*re-writing of the Constitution and robbing the legislature of acting within the framework of the Constitution*”.<sup>36</sup> He also expressed concerns about the ensuing practical difficulties, noting that allowing the extension would subject every piece of ordinary legislation, which are far more common than constitutional amendments, to challenges based on violations of the Doctrine, even though such legislation was enacted within the scope of the plenary powers of the legislature.

While H.R. Khanna J. opted to not address this issue,<sup>37</sup> K.K. Mathew J., in his concurring opinion, first articulated his view that ordinary laws could not be tested for basic structure violations.<sup>38</sup> His analysis deepened in response to the respondent's contention that even if Art. 14 of the Constitution was not recognised as part of the basic structure in *Kesavananda*, the concept of ‘equality’ was an essential feature of democracy and the rule of law. He examined the interplay between concepts like equality, rule of law, etc. and the specific provisions of the Constitution to conclude that such concepts, by themselves, are inherently ambiguous, and

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<sup>33</sup> *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1, ¶ 132.

<sup>34</sup> RICHARD TUR & WILLIAM TWINING, *ESSAYS ON KELSEN*, at 111 (Oxford University Press, 1986).

<sup>35</sup> HANS KELSEN, *PURE THEORY OF LAW*, at 226 (University of California Press, 1st ed. 1967).

<sup>36</sup> *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1, ¶ 134.

<sup>37</sup> *Id.* ¶ 239.

<sup>38</sup> *Id.* ¶ 317, 329.

their ‘genuine’ forms, as sought to be guaranteed by the ‘Indian Democratic Republic’, are subsumed within specific provisions of the Constitution.<sup>39</sup>

The discussion that follows offers key insights into the ‘identification’ of basic features, in contradistinction to the ‘idea’ of the Doctrine. Mathew J. emphatically remarks that “[t]o be a basic structure, [the feature concerned] ... must be a terrestrial concept having its habitat within the four corners of the Constitution”.<sup>40</sup> In this sense, applying the Doctrine to an otherwise constitution compliant ordinary legislation would amount to testing the said ordinary legislation on the strength of some imported concept, foreign to the enacted provisions of the Constitution. Mathew, J. strictly disapproves of such adventurism.<sup>41</sup> This understanding has a significant bearing on the ‘Why’ question insofar as the purpose of fancying such an extension is itself questioned. If the basic features are to be located in specific provisions of the Constitution, then the inquiry should directly proceed with examining the ordinary legislation’s compliance with the provisions of the Constitution rather than treading the tricky and convoluted path of the basic structure review. Mathew J. expressed similar concerns by noting that what is put forth as a ‘basic feature’ is oftentimes a political term, prone to contradictory meanings by its very nature.<sup>42</sup> As such, in light of express limitations, he refused to read in any limitations of basic structure in Articles 245 and 246 of the Constitution.

However, M.H. Beg J. observed that the Doctrine can be invoked to test the validity of both – constitutional amendment and ordinary law because “ordinary law making itself cannot go beyond the range of [the] constituent power”.<sup>43</sup> This is again another strand of interpretation of Kelsen’s theory. Although there is no doubt that lower legal norms cannot go beyond higher legal norms, the nuance lies in the approach of testing the same. The nuance lies in appreciating that Kelsen’s legal order is not a higher legal order directly controlling all other dissimilarly placed lower orders, rather, it is a hierarchical mechanism where one controls the other and the other, in turn,

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<sup>39</sup> *Id.* ¶ 343.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* ¶¶ 347-359.

<sup>42</sup> See SAMUEL EDWARD FINER, *COMPARATIVE GOVERNMENT*, at 62-63 (The Penguin Press, 2nd ed., 1970).

<sup>43</sup> *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp SCC 1, ¶ 622.

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controls yet another. Nevertheless, the observations by Beg J. form an obiter dictum as he fairly notes that at the said stage, he was only concerned with the question qua constitutional amendment.<sup>44</sup>

YV Chandrachud J. adopts an approach similar to Ray CJ. as he expressly rejected the extension of the Doctrine primarily because the same does not flow from *Kesavananda*. Although this proposition appears alluringly simple, it highlights the ‘identity’ argument for non-extension. That is to say, the ‘identity’ of the Doctrine as a restriction on the constituent power of the Parliament, and none other, should be preserved unless compelling reasons for extension are found. Interestingly, Chandrachud J. also gives his own interpretation of the argument based on Kelsen’s Theory by noting that “*certain limitations operate upon the higher power for the reason that it is a higher power ... the two powers, though species of the same genus, operate in different fields and therefore [are] subject to different limitations.*”<sup>45</sup>. In a way, this observation directly addresses Beg J.’s concerns in a manner similar to the reasoning given above.

Therefore, what emerges is that the majority had a consensus on the position that the Doctrine cannot be extended to test ordinary legislation, with multiple lines of reasoning offered to substantiate the same.

### **The *Inquiry Commission* case**

Shortly after the express rejection to extend the Doctrine in the *Election* case, a backdoor entry to the same was sought to be made in *State of Karnataka v. Union of India*<sup>46</sup> (“**Inquiry Commission case**”). Invoking the original jurisdiction of the Supreme Court under Art. 131 of the Constitution, the State of Karnataka challenged the Constitution of an inquiry commission looking into corruption allegations against the Chief Minister and other ministers of the State.<sup>47</sup> Although the State failed in establishing a violation of an express provision of the Constitution; it took

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.* ¶ 692.

<sup>46</sup> *State of Karnataka v. Union of India*, (1977) 4 SCC 608.

<sup>47</sup> The Commissions of Inquiry Act, 1952, § 3, No. 60, Acts of Parliament, 1952.

recourse to the Doctrine to sustain its “gallant attacks”.<sup>48</sup> It assailed the law on the basis of concepts such as ‘basic scheme’ and ‘fundamental backbone of the Centre-State relationship’, which was essentially a plea of basic structure violation, albeit not argued candidly in view of the *Election* case being decided just two years earlier. Such a ‘strategy’ invited a divided opinion by the 7-Judge bench.

N.L. Untwalia J., speaking for P.N. Singhal, Raja Jaswant Singh JJ., and himself, delivered the majority opinion on this limited issue of extension. The majority expressly rejected the State’s submission by affirming the view in the *Election* case (specifically endorsing the view of YV Chandrachud J. thereof).<sup>49</sup> It was pointed out that the theory of implied prohibition or limitation has been rejected time and again in India and elsewhere; thus, no such limitations of the ‘basic scheme’ can be read in Articles 245 and 246 of the Constitution.

Although the separate view of M.H. Beg C.J. forms a minority on this limited issue of extension, it deserves careful consideration as he attempts to improve upon his reasoning in the *Election* case. At the outset of his opinion, he offers sound advice that one must not apply the Doctrine merely because of the binding nature of *Kesavananda*, rather, one must judiciously identify the specific “*type of cases to which [the Doctrine] could and other to which it could not apply*”.<sup>50</sup> Further, he observes that the basic structure emerges from nothing but a multi-provisional interpretation of the Constitution. To him, the basic structure is not “*floating, like a cloud in the skies, above the surface of the Constitution and outside it or one that lies buried beneath the surface*”, rather, it is “*nothing more than a set of obvious inferences ... arrived at by applying the established canons of construction*”.<sup>51</sup> This understanding most closely resembles Mathew J.’s line of reasoning in the *Election* case qua ‘identification’ of basic features.

However, in what marks a shift in the approach, he revisits his opinion in the *Election* case to suggest that although the Doctrine, in the sense it evolved in *Kesavananda*, does not extend to the legislative sphere and is

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<sup>48</sup> *Id.* ¶ 128.

<sup>49</sup> *Id.* ¶ 269.

<sup>50</sup> *Id.* ¶ 129.

<sup>51</sup> *Id.* ¶ 141.

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limited to the sphere of constituent powers only; but there are certain imperatives necessarily flowing from the basic structure of the Constitution, i.e., from multi-provisional interpretation, that deserve to be treated similarly to its express provisions.<sup>52</sup> These imperatives may nonetheless be applied to test the validity of ordinary laws, in the same manner that the express provisions are applied.<sup>53</sup> This line of reasoning perhaps conflates the ‘identity’ of the Doctrine with the method of ‘identifying’ the basic features.

It must be noted that the ‘identity’ of the Doctrine still lies in its operation on the constituent powers, which ensures that the most fundamental features of the Constitution are not damaged in its exercise. The mere fact that the specific basic features are ‘identified’ using a multi-provisional interpretative technique does not alter the heart and soul of the Doctrine as a limitation on the constituent power. Hence, merely because the identification technique is relatable to the phrase “*subject to provisions of the Constitution*” of Art. 245, the Doctrine should not be readily extended to the sphere of legislative powers as well. In our view, this does more harm than good. Attributing such elasticity to the Doctrine may potentially reduce it to a tool of convenience, thereby diluting its identity. Such a sea change in the Doctrine’s identity, i.e., its disassociation from its very origins in the sphere of constituent powers, would perhaps render it bereft of any identity at all.

Even Beg, C.J. appears to be conscious of such consequences as he takes cognizance of the fact that the Doctrine cannot be extended to the legislative sphere “*in that sense*”<sup>54</sup>. The perils of construing the technique of identification of the Doctrine as its independent identity are highlighted when he asserts that “*the basic scheme of the Constitution could certainly be invoked*”<sup>55</sup> to invalidate an ordinary central law when it operates on a subject matter that pertains either exclusively to the domain of constitutional powers or to State’s legislative powers. Indeed, there is no debate that Parliament cannot amend the Constitution or encroach on State List

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<sup>52</sup> *Id.* ¶146.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* ¶ 148.

entries in the exercise of its legislative power, but this is properly assailed as a violation of Art. 246 and not of some ‘basic scheme’ or ‘basic feature’ of the Constitution. Challenges to such actions of the Parliament must be sharp and clearly defined, eliminating the exercise involved in finding the contours of the said ‘basic scheme’ or ‘feature’.

It appears that Beg C.J., in an attempt at crystallising the basic structure as a “*mode of interpreting the Constitution only*”<sup>56</sup>, seemingly revived the theory of ‘implied limitations’, which was expressly rejected by the majority in *Kesavananda*. Krishnaswamy rightly remarks that Beg C.J. attempted to justify what was expressly rejected by turning to provisions of the Constitution and re-characterising it as a theory of ‘necessary implications’.<sup>57</sup> However, neither does Beg C.J. go on to overrule the *Election* case nor does he expressly distinguish it despite discussing the same at length.

Be that as it may, Beg C.J.’s postulation and acceptance of extending the Doctrine to test ordinary legislation form a minority view on this limited issue. The majority view, as authored by Untwalia J., for Singhal, Singh J., and himself, that no implied limitations of basic scheme can be read in Articles 245 and 246 remains the view of the 7-Judge bench. Therefore, there was a consistent judicial opinion against the extension of the Doctrine in the initial stage of development.

### C. PART 2: PHASE OF DISORDERLY DEVELOPMENTS

Having examined the decisions where the Apex Court, specifically addressed the key issue, this part now turns to other decisions that shaped the contours of the debate, albeit not considering the scope of the Doctrine as a core issue for determination. This part highlights the judgments that muddled the debate by dealing with the Doctrine in a roundabout manner, without actually investigating its ‘identity’ and applicability in the first place. Our attempt in this part is to not only highlight the tangents of the central debate, which have arisen due to the haphazard manner of dealing with the Doctrine but also to critically examine the said decisions in particular and harmonise them in general.

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<sup>56</sup> *Id.* ¶ 150.

<sup>57</sup> KRISHNASWAMY, *supra* note 6, at 62.

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### **The *Ayodhya Acquisition* case**

One of the rare instances where the Doctrine was extensively discussed to test the vires of an ordinary legislation is that of *M. Ismail Faruqui v. Union of India*<sup>58</sup> (“**Ayodhya Acquisition case**”). Surprisingly, the binding ratios of the *Election* and *Inquiry Commission* cases as regards the extension of the Doctrine were not even referred to, much less considered, in this decision. This raises serious concerns about the propriety of the Court’s approach. As such, this decision requires detailed independent consideration. The petitioners herein mounted a composite challenge against an ordinary law<sup>59</sup> on the twin grounds, namely violation of secularism and rule of law, being basic features, and of Articles 25, 26, along with Art. 14 of the Constitution. JS Verma J., speaking for Venkatachaliah C.J., A.N. Ray J., and himself, addressed the arguments on secularism and basic structure at length rather than delving into the contours of the challenge based on specific constitutional provisions. S.P. Bharucha J., speaking for A.M. Ahmadi, J. and himself, delivered the minority opinion, observing that the provisions of the Act effaced the principle of secularism from the Constitution.<sup>60</sup>

Despite the division of the bench on certain matters of merits, there was a consensus on the invalidity of sub-section (3) of section 4, which provided for abatement of all pending suits and legal proceedings in respect of rights, title and interest in the disputed property. However, even in this agreement, the majority and the minority opinions resorted to contrasting approaches. The majority held that since the issues framed in the simultaneous reference under Art. 143(1) of the Constitution did not adequately cover the issues framed and defences advanced in the pending suits, it was not an effective alternative dispute resolution mechanism.<sup>61</sup> Therefore, the majority struck down the impugned provision as violative of the Rule of Law, for it extinguished the judicial remedy for the resolution of the dispute.<sup>62</sup>

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<sup>58</sup> *M. Ismail Faruqui (Dr) v. Union of India*, (1994) 6 SCC 360.

<sup>59</sup> *The Acquisition of Certain Area at Ayodhya Act, 1993*, No. 33, Acts of Parliament, 1993.

<sup>60</sup> *M. Ismail Faruqui (Dr) v. Union of India*, (1994) 6 SCC 360, ¶ 140.

<sup>61</sup> *Id.* ¶ 61, 62.

<sup>62</sup> *Id.* ¶ 96(1).

The minority, on the other hand, adopted a more rigorous inquiry by resorting to the canons of statutory interpretation, such as reading the statute as a whole. The minority noted that whereas Section 4(3) of the impugned Act abated the disputes pertaining to title and interest in the acquired property, they were essentially revived by the operation of Section 8 of the impugned Act,<sup>63</sup> which provided for the award of compensation to the owners of the acquired property. Section 8(3) provided for the appointment of a Claims Commissioner who was required to decide the claim of the owner or any person having a claim against the owner as per the procedure devised by himself.<sup>64</sup> Essentially, the issues in the pending proceedings relating to the title and interest in disputed property were to be adjudicated by a quasi-judicial delegate, i.e., the Claims Commissioner with no right of appeal, review, or reference being provided. The minority considered such an arrangement to be arbitrary and unreasonable and struck down the impugned provision.<sup>65</sup>

The approach of the minority, in this limited regard, offers a more convincing basis whereby the offending part of Section 4 was struck down as violative of Art. 14 of the Constitution inasmuch as it was arbitrary and unreasonable. The minority did not invoke the Doctrine yet arrived at the same result and in a more convincing manner. This judgement is an apt example of how extending the basic structure review to ordinary legislation robs the review of any critical enquiry into the subject matter. It is rather prone to being used as a convenient tool that may be contended and applied in an omnibus fashion.

### ***The Kanungo, APSC, and Indra Sawhney Trinity***

The woes highlighted above are further aggravated by the approach adopted in *GC Kanungo*<sup>66</sup>, *APSC*<sup>67</sup>, and *Indra Sawhney-II*,<sup>68</sup> where the Court invoked the basic features despite none being warranted. The impugned legislations in these cases were challenged for violation of specific

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<sup>63</sup> *Id.* ¶ 127, 133.

<sup>64</sup> *Id.* ¶ 133.

<sup>65</sup> *Id.*

<sup>66</sup> *G.C. Kanungo v. State of Orissa*, (1995) 5 SCC 96.

<sup>67</sup> *A.P. State Council of Higher Education v. Union of India*, (2016) 6 SCC 635.

<sup>68</sup> *Indra Sawhney v. Union of India*, (2000) 1 SCC 168.

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provisions of the Constitution, calling upon the Court to undertake a ‘Part III compliance’ review. However, the Court seemed to entirely sideline these arguments in favour of directly applying the Doctrine in vacuo. At this juncture, it would be fair to note that such an approach is not solely attributable to the zealotry of the Courts in invoking the Doctrine, but also to the confusion created by the inconsistent approach of the courts. *Krishnaswamy* also argues that the approach in these decisions blur the distinction between the basic structure review based on general constitutional rules and the ‘Part III compliance’ review based on specific constitutional provisions.<sup>69</sup>

In any case, these decisions, where the courts have not satisfactorily appreciated the composite challenges i.e. those based on constitutional provisions as well as the Doctrine, go against the settled position laid down in the *Inquiry Commission Case* and the *Election Case*. This approach of the Court makes the Doctrine a tool of easy challenge and adjudication, thereby depriving the opportunity for independent evolution of the provisions of the Constitution.

### **The *Rajya Sabha* case**

A 5-judge bench was again invited to harmonise this disorderly development in the Doctrine’s application in *Kuldip Nayar v. Union of India*, popularly known as the *Rajya Sabha* case.<sup>70</sup> Herein, the petitioner assailed the removal of the domicile requirement for being elected to the Council of States<sup>71</sup> on grounds of violation of the principle of federalism, a basic feature. In its attack, the Petitioner relied upon *DC Wadhwa* to illustrate an earlier occasion where an ordinance was struck down for being “*repugnant to the constitutional scheme*”. Further reliance was placed on *Indra Sawhney – II* to prevent the striking down of ordinary legislation for violation of the basic structure.

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<sup>69</sup> KRISHNASWAMY, *supra* note 6, at 126.

<sup>70</sup> *Kuldip Nayar v. Union of India*, (2006) 7 SCC 1.

<sup>71</sup> The Representation of the People (Second Amendment) Act, 2003, No. 2, Acts of Parliament, 2004.

Y.K. Sabharwal C.J., speaking for the bench unanimously, observed that the view taken in *DC Wadhwa* was in “face of clear violation of the express constitutional provisions”<sup>72</sup> and not the basic structure in vacuo. As regards *Indra Sawhney – II*, he noted that the Court was essentially dealing with a question of violation of equality and not the basic structure *per se*. It was further observed that in the cases relied upon by the Petitioner, namely *DC Wadhwa*, *Indra Sawhney – II*, and *L. Chandra Kumar*, the question regarding the scope of the Doctrine was neither raised nor considered and the observations were merely obiter dicta.

The Court reiterated the *Election* case and the *Inquiry Commission* case as the settled law of the land.<sup>73</sup> However, it must be appreciated that the matter before the Court presented it with an opportune moment to harmonise the approach adopted in the *Ayodhya Acquisition* case as well; but neither the parties nor the judges averted, much less applied, themselves to the same. Therefore, the fact that both the decisions - the *Ayodhya Acquisition* and the *Rajya Sabha*, were rendered by coordinate benches of 5-Judges does not allow us to assert that the position was ‘settled’ in this case.

## **BROADENING THE SCOPE: THE TRIBUNALISATION SAGA**

The previous section of this essay was an attempt to examine and harmonise the decisions of the Supreme Court rendered in contexts of various ordinary legislations and distinct themes. Although a common string was identified in the said decisions because the Doctrine came to be discussed directly or indirectly, there was no uniformity as regards their individual merits. This section goes a step further and identifies a series of judgements that concern uniform issues of judicial independence and separation of powers, where the key issue of extending the Doctrine’s application has also been considered. The saga pertains to the decisions tracing the emergence and development of tribunals in India, with a hint of higher judiciary independence as well.

### **S.P. Sampath Kumar v. Union of India<sup>74</sup>**

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<sup>72</sup> *Kuldip Nayar v. Union of India*, (2006) 7 SCC 1.

<sup>73</sup> *Id.* ¶¶ 96, 105.

<sup>74</sup> *S.P. Sampath Kumar v. Union of India*, (1987) 1 SCC 124.

## DELIMITING THE DOCTRINE: AN ARGUMENT AGAINST BASIC STRUCTURE REVIEW OF ORDINARY LAWS

The earliest case pertaining to tribunalisation in India saw two novel approaches to the issue of extension being adopted by the 5-Judge bench of the Supreme Court to a challenge to the exclusion of High Courts' writ jurisdiction by an ordinary law<sup>75</sup> enacted consequent to Art. 323A of the Constitution.<sup>76</sup> The ouster of jurisdiction was primarily assailed as violative of the basic feature of judicial review. This was essentially a challenge to sub-clause (d) of clause (2) of Art. 323A of the Constitution as it empowered an ordinary law to provide for such an ouster.

Ranganath Misra J. speaking for V. Khalid, G.L. Oza, M.M. Dutt JJ. and himself, in his lead opinion, endorsed Y.V. Chandrachud's view in *Minerva Mills*<sup>77</sup> whereby it was suggested that ouster of the High Court's jurisdiction was permissible if the Parliament establishes an "*effective alternative institution for judicial review*". In this context, he examines whether the Administrative Tribunal proposed to be established as an effective substitute for High Courts. Although he does not invalidate any provision on the basis of the Doctrine or any other express provisions of the Constitution, he indicates certain amendments required to be brought in to make the impugned Act constitution-compliant. His conclusions in this regard are largely based on principles of acceptable justice and incentives for judges.

P.N. Bhagwati C.J. in his concurring opinion, adopted an innovative approach whereby instead of testing the impugned Act on grounds of basic structure violation directly; he first interpreted Art. 323A of the Constitution in a basic structure compliant manner and then proceeded to test the impugned Act for compliance with the so construed Art. 323A of the Constitution.<sup>78</sup> Such an approach is not found in any earlier decisions and merits a closer examination. He observed that if the 42<sup>nd</sup> Amendment is construed to have inserted Art. 323A of the Constitution in such a manner that allows exclusion of Articles 226 and 227 jurisdictions without the establishment of an "*effective alternative institutional mechanism or arrangement for judicial review*", it would fall foul of the Doctrine.<sup>79</sup> Therefore, the

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<sup>75</sup> The Administrative Tribunals Act, 1985, No. 13, Acts of Parliament, 1985.

<sup>76</sup> INDIA CONST. art. 323A.

<sup>77</sup> *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625.

<sup>78</sup> *S.P. Sampath Kumar v. Union of India*, (1987) 1 SCC 124, ¶¶ 4-5.

<sup>79</sup> *Id.* ¶ 4.

requirement of the effective substitute must be “*read as implicit in this constitutional amendment*”.<sup>80</sup> This approach enabled him to then test the validity of the impugned Act based on the parent constitutional provision itself.

Notably, the constitutional validity of Articles 323A(2)(d) and 323B(2)(d) of the Constitution was challenged as being violative of the Doctrine in *L. Chandra Kumar v. Union of India*.<sup>81</sup> The seven-judge bench invalidated the impugned provisions of the Constitution because they excluded the jurisdiction of the Supreme Court under Art. 32 and of High Courts under Articles 226 and 227. Consequently, Section 28 of the Administrative Tribunals Act, 1985, which was enacted “*under the aegis of the said provisions of the Constitution*”<sup>82</sup> was also struck down. Whereas this decision has been understood by scholars<sup>83</sup> and courts in subsequent judgements<sup>84</sup> as an instance of the application of the Doctrine on ordinary legislation — specifically noting that Section 28 of the said Act was held unconstitutional, it is important to appreciate that Section 28 of the said Act was not tested on the Doctrine itself but merely invalidated as a consequence of its parent constitutional provision being invalidated to that extent.

### **Union of India v. R. Gandhi<sup>85</sup> (MBA-I)**

The second case in the series revisited Beg C.J.’s minority view from the *Inquiry Commission* case permitting the Doctrine’s extension, perhaps because he authored the majority view as regards other issues therein. The appellants mounted a challenge to the transfer of the High Courts’ entire company law jurisdiction to the National Company Law Tribunal<sup>86</sup> as being violative of the Rule of Law, separation of powers, and independence of the Judiciary. To this, the Union of India specifically contended that ordinary legislation cannot be challenged for violation of the Doctrine.

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<sup>80</sup> *Id.*

<sup>81</sup> *L. Chandra Kumar v. Union of India*, (1997) 3 SCC 261.

<sup>82</sup> *Id.* ¶ 99.

<sup>83</sup> See Pathik Gandhi, *Basic Structure and Ordinary Laws (Analysis of the Election Case & the Coelho Case)*, 4 INDIAN J. OF CONST. L. 47 (2010).

<sup>84</sup> See *Madras Bar Association v. Union of India*, (2022) 12 SCC 455, ¶ 77.

<sup>85</sup> *Union of India v. R. Gandhi*, (2010) 11 SCC 1.

<sup>86</sup> The Companies (Second Amendment) Act, 2002, No. 11, Acts of Parliament, 2002.

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This set the stage for the five-judge bench to revisit the age-old debate in the modern context.

RV Raveendran J. delivered the unanimous opinion of the bench. The Court, after briefly considering various judicial pronouncements and Memorandum by framers of the Constitution<sup>87</sup> on the independence of the judiciary, noted that the independence of the judiciary has always been recognised as a part of the basic structure of the Constitution. A similar exercise was undertaken with respect to the separation of powers, concluding that it too forms a part of the basic structure.

The Court then considered the *Election* case and the *Inquiry Commission* case to hold that although ordinary legislation cannot be assailed on grounds of violation of the Doctrine, it can certainly be “*challenged as violative of constitutional provisions which enshrine the principles of Rule of Law, separation of power and independence of Judiciary*”.<sup>88</sup> Consequently, the offending parts of the impugned Act were struck down as unconstitutional by tracing the principles contented to specific provisions of the Constitution.

A significant takeaway from this decision is however that by this approach of implying provisions as ‘enshrined’ in the provisions, the five-judge Bench essentially adopted the reasoning of Beg C.J. in the *Inquiry Commission* case. The Court failed to note that although Beg C.J. authored the lead opinion in the *Inquiry Commission* case, his line of reasoning as regards the applicability of the Doctrine formed a minority in the face of the other three judges’ contrary views. This marked the beginning of the broadening of the Doctrine in the modern context which later culminated into the Doctrine having acquired a secondary meaning, as illustrated in the forthcoming portion of this section of the essay.

### **MBA-II (2014)**

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<sup>87</sup> B. SHIVA RAO, *THE FRAMING OF INDIA’S CONSTITUTION* 196 (Law and Justice Publishing Company, 1st ed., 1967).

<sup>88</sup> *Union of India v. R. Gandhi*, (2010) 11 SCC 1, ¶ 41.

Unlike the flawed approach of Beg C.J.'s minority in *MBA-I*, the five-judge Bench in *Madras Bar Association v. Union of India*<sup>89</sup> attempted to articulate a constitutional basis for the extension of the Doctrine for the first time. This was a welcome approach given the dearth of judicial application of mind in this regard. Here, the petitioner had challenged the National Tax Tribunal Act, 2005 and Art. 323B, inserted vide Constitution (forty-second Amendment) Act, 1976, as being violative of separation of powers, rule of law, and judicial review.

J.S. Khehar J., speaking for R.M. Lodha, the C.J.I. J.S. Khehar, Jasti Chelameswar, A.K. Sikri JJ. and himself, addressed the key issue of the extension of the Doctrine and approached it in a unique manner. He attempted to provide a constitutional basis for such an extension in the following manner. He first presumed that the Parliament was competent to enact ordinary legislation in terms of Articles 245 and 246 read with the relevant entries of the Seventh Schedule of the Constitution. He then referred to the procedure outlined in Part XI of the Constitution only to conclude that the legislative power conferred by Part XI has one overall exception, which “*undoubtedly is, that the basic structure of the Constitutional cannot be infringed, no matter what*”<sup>90</sup>. He then notes that various judicial pronouncements have consistently held that an amendment to the provisions of the Constitution would not be sustainable if it violates the basic structure even though the amendment would have been carried out by following the procedure contemplated in Part XI of the Constitution. Therefore, in the view of the majority, “*even though the legislation had been enacted by following the prescribed procedure, and was within the domain of the enacting legislature, any infringement to the basic structure would be unacceptable*”<sup>91</sup>.

It is imperative to note that Khehar J. never actually examined the text of either Articles 245 and 246 or Article 368. Whereas the earlier judicial pronouncements adopted the aforementioned view in the context of Art. 368 precisely because it contained a non-obstante clause excluding any scrutiny on the basis of other constitutional provisions, whereas Art. 245 expressly subjects the legislative power of the Parliament to other provisions of the Constitution. The non-appreciation of this distinction by

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<sup>89</sup> *Madras Bar Association. v. Union of India*, (2014) 10 SCC 1.

<sup>90</sup> *Id.* ¶ 65.

<sup>91</sup> *Id.*

## DELIMITING THE DOCTRINE: AN ARGUMENT AGAINST BASIC STRUCTURE REVIEW OF ORDINARY LAWS

Khehar J. led him to a flawed conclusion. This illustrates an instance where the ‘how’ question was articulated yet the ‘why’ question remained unanswered. This approach is in teeth of the *Election* case and the *Inquiry Commission* case as an application of the Doctrine to an otherwise constitution compliant ordinary legislation, as presumed, would amount to construing the basic structure as something beyond or in addition to the provisions of the Constitution, which is an impermissible construction in view of the settled law.

### **The NJAC case**

The tussle between the Parliament and the Judiciary witnessed yet another milestone when the Parliament enacted the Constitution (Ninety-ninth Amendment) Act, 2014<sup>92</sup> and consequently, the National Judicial Appointments Commission Act, 2014<sup>93</sup> (“**NJAC Act**”). This also marks a sharp disagreement between two separate opinions regarding the debate of extension in a well-articulated manner and thus deserves careful examination.

The ordinary legislation, along with the constitutional amendment, essentially replacing the then prevailing system of ‘Collegium’, was assailed in *SCAORA v. Union of India*,<sup>94</sup> as being violative of primacy and independence of the judiciary in matters of appointment and transfers, which are basic features of the Constitution. The respondents promptly countered this by contending that the vires of an ordinary legislation could only be assailed on limited grounds of legislative competence and violation of Art. 13. The respondents correctly identified that the competence review under Article 245 required compliance with all the provisions of the Constitution and not merely Part III provisions. These contentions again saw the bench divided with Lokur J. and Khehar J. rendering diametrically opposite opinions; the rest expressing no opinion.

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<sup>92</sup> INDIA CONST., art. 342A. cl. 1 & 2, *amended by* The Constitution (One Hundred and Second Amendment) Act, 2018.

<sup>93</sup> The National Judicial Appointments Commission Act, 2014, No. 40, Acts of Parliament, 2014.

<sup>94</sup> Supreme Court Advocates-on-Record Association v. Union of India, (2016) 5 SCC 1.

Lokur J. began his inquiry by discussing the nature of the Doctrine, as it evolved in *Kesavananda*. His analysis of *Kesavananda* essentially described the ‘identity’ of the Doctrine, as we have put it, as being a limitation on the amending power of the Parliament under Art. 368 of the Constitution. He then traced the series of judgements, as if they were a string of pearls, that rejected the extension of the Doctrine to ordinary legislation viz. the *Election case*, the *Inquiries case*, *Kuldip Nayar*, and *Ashoka Kumar Thakur*. He does take note of the divergent opinion expressed by Khehar J. in *MBA-II*, but proceeds to adopt the view of the seven-judge bench in the *Inquiries case* as a binding precedent. He then adverted to the submission of the respondent that the challenge to the 99th Constitution Amendment Act and the NJAC Act shall be bifurcated for the grounds of challenge and principles applicable to both are quite distinct and independent.<sup>95</sup> Lokur J. endorsed this view by consolidating the available grounds of challenge for both types of laws; whereas a constitutional amendment can be assailed only on violation of the basic structure, an ordinary legislation can only be assailed on (i) lack of competence of the Legislature, (ii) violation of Art. 13 of the Constitution, (iii) enactment contrary of express prohibitions in the Constitution,<sup>96</sup> and (iv) procedural irregularity.<sup>97</sup>

*Per contra*, Khehar J. found this to be an opportune moment to develop his line of reasoning expressed in *MBA-II*. He devoted an entire chapter, so to speak, in his lead opinion to substantiate the same. His inquiry, however, appears to suffer from the same vice of ‘identity’ and ‘identification’ conflation. Since the ‘basic features’ are essentially ‘determined’ by deducing concepts from a collective reading of the provisions of the Constitution, he observed that a challenge to an ordinary legislation on the grounds of basic structure violation is to be understood as a challenge on the basis of such provisions read collectively and harmoniously.<sup>98</sup> It thus logically flows that finding a breach of basic features is equivalent to finding a breach of a bunch of provisions read together. In postulating so, he

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<sup>95</sup> *Id.* ¶¶ 993-994.

<sup>96</sup> *See* Chhotabhai Jethabhai Patel v. Union of India, 1962 Supp (2) SCR 1.

<sup>97</sup> *See* Kihoto Hollohan v. Zachillhu, 1992 Supp (2) SCC 651, ¶ 61-62.

<sup>98</sup> Supreme Court Advocates-on-Record Association v. Union of India, (2016) 5 SCC 1, ¶ 339.

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attempted to provide a novel reason in favour of extending the scope of the Doctrine.

Whereas the previous debates were largely concerned with the contours and ways of extending the scope, not much was said about the supposed advantages that such an extension would bring. Simply put, Khehar J. offered the advantage of convenience. According to him, ‘basic structure’ was to be construed as a bundle or a basket of provisions of the Constitution so that all of the constituent provisions need not be reiterated time and again. It would “*obviate the necessity of recording the same conclusion, which has already been scripted while interpreting the Article(s) under reference, harmoniously*”. As such, he unequivocally concluded that an ordinary legislation can be assailed for violation of any ‘basic features’ of the Constitution. However, in doing so, it would be technically sound to refer to the provisions that are supposedly violated when a challenge to an ordinary legislation is mounted.

However, this reasoning suffered on two counts. First, it closely resembles the approach of Beg C.J. in the *Inquiries* case and Raveendran J. in *R. Gandhi* and suggests that ordinary legislation may be tested on first derivative concepts of constitutional provisions. While it may be a simple proposition at the first instance, it opened a window for looking into ‘necessary implications’ of the said concepts itself, in essence, a second derivative of the constitutional provisions. Once allowed, no precise boundaries can be placed on degrees of derivative meanings or interpretations, however remote, that may be devised, argued, and applied in the courts of law.

Per contra, testing the ordinary legislation on the basis of the provisions in the first instance provides a better sense of boundaries in which the derivatives or ‘necessary implications’ may be devised. Second, it reduces the ‘identity’ of the Doctrine to a mere placeholder for convenience. Repetition of recording the same conclusions is not a factor, much less a determinative one, in the debate of extending the scope and applicability of the Doctrine. Rather, it is the sanctitude and context in which the Doctrine emerged that is desired to be preserved. However, since the opinions of Lokur J. and Khehar J. were in direct disagreement with one

another and no other opinion was expressed by the rest, no conclusion can be attributed to the view of the bench and the issue was left unanswered.

### **MBA-III: Evolution of a secondary meaning**

Next in the series, *Rojer Mathew v. South Indian Bank Ltd.*,<sup>99</sup> highlights a curious case where neither the parties nor the bench advertised the issue of extension. The petitioners herein had principally challenged a law providing for tribunal reforms<sup>100</sup> as being a colourable exercise of legislative power and a violation of the basic structure.

Gogoi J. speaking for the bench, unanimously acceded to the petitioner's contention that the lack of judicial dominance in the Search-cum-Selection Committee is in direct contravention of the doctrine of separation of powers and is an encroachment on the judicial domain.<sup>101</sup> Further, the Court held that the rules providing for the designation of the Secretary to the Government of India in the Ministry or Department under which the Tribunal is constituted as the convener of the Search-cum-Selection Committee were in direct violation of the separation of powers doctrine, thus contravening the basic structure of the Constitution.<sup>102</sup>

Surprisingly, neither the Union of India contended the non-applicability of Doctrine to ordinary legislation nor the court concerned itself with the debate surrounding this issue in the entire judgement. It is perhaps in this background of 'tribunalisation cases' that the Doctrine has acquired a new sense, a new identity, which better resonates with Khehar J.'s understanding of the Doctrine in *NJAC*.

### **MBA-IV: Distinguishing the Doctrine from the Principles**

In what is described by L. Nageswara Rao J. as a sequel to *Rojer Mathew*, a 3-judge bench presided over the challenge to yet another law providing for

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<sup>99</sup> *Rojer Mathew v. South Indian Bank Ltd.*, (2020) 6 SCC 1.

<sup>100</sup> The Finance Act, 2017, No. 7, Acts of Parliament, 2017.

<sup>101</sup> *Rojer Mathew v. South Indian Bank Ltd.*, (2020) 6 SCC 1, ¶ 153.

<sup>102</sup> *Rojer Mathew v. South Indian Bank Ltd.*, (2020) 6 SCC 1, ¶ 179.

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similar tribunal reforms<sup>103</sup> in *MBA-IV*.<sup>104</sup> The petitioners again mounted a composite challenge of violation of Articles 14, 21, and 50 of the Constitution and of principles of separation of powers and independence of the judiciary.

While *Rojer Mathew* had unequivocally struck down the 2017 Rules as violative of the basic structure of the Constitution, the Court interestingly observed that the 2017 Rules were invalidated as being “*contrary to the principles of the Constitution as interpreted by various decisions of this Court*” in reading *Rojer Mathew*. The issues framed also adopted a similar approach whereby various facets of the 2020 Rules, viz. Seach-cum-Selection Committees, eligibility, appointment, and term of office, were to be tested on the anvil of conformity with ‘principles’ of judicial dominance or separation of powers or independence of judiciary. It thus emerged that the Court was consciously avoiding any reference to the Doctrine; even in the discussion that ensued. The Court directed various amendments to the 2020 Rules to ensure that they comply with the aforesaid ‘principles of the Constitution’ and earlier judicial pronouncements; it did not express why any references to the Doctrine were avoided.

However, an understanding that is perhaps forthcoming is that the Court realised that the Doctrine exclusively operates as a limitation on the constituent power of the Parliament only, and it would not be proper to extend it to the ordinary legislative power. This approach of the Court better frames the essence of Khehar J.’s opinion in *NJAC*. Whereas it is certainly in the interest of expediency that the same conclusions regarding constitutional principles such as independence of the judiciary are not reiterated and re-recorded time and again, and a reference to the principle should be construed as a reference to Articles 14, 21, 36, 50, etc. read harmoniously; it does not logically follow that invocation of the Doctrine is *sine qua non* for assailment on violation of principles emergent from multi-provisional interpretation of the Constitution.

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<sup>103</sup> Tribunal, Appellate Tribunal and other Authorities (Qualification, Experience and Other Conditions of Service of Members) Rules, 2020.

<sup>104</sup> *Madras Bar Association v. Union of India*, (2021) 7 SCC 369.

While some challenges to ordinary legislations may be directly relatable to certain specific provisions of the Constitution, as in *Indra Sawhney (II)*, others may be relatable to multi-provisional interpretations. There is no doubt that interpretations emerging from harmonious reading of numerous provisions of the Constitution can be referred to as principles of the Constitution for the sake of convenience; a challenge based on such emergent interpretation need not invoke the unrelated doctrine of basic structure, which operates in a totally different field, merely because the said principle also finds mention as a ‘basic feature’ in that doctrine. The Court appears to have recognised this very approach, thereby reconciling the substance of Khehar J.’s approach in *NJAC* and the identity of the Doctrine.

### **MBA-V: Crystallising the difference**

The final case in the series,<sup>105</sup> at least for the time being, offers key insights into the modern understanding of the Doctrine. It bolsters the argument for the preservation of the Doctrine’s identity as against its extension to ordinary legislation. This case saw a challenge to the Tribunal Reforms Ordinance, 2021 for violation of the trinity of Articles 14, 21, and 50 of the Constitution. It was asserted that the Ordinance was violative of the ‘principles’ of separation of powers and independence of the judiciary. The respondent naturally contended that ordinary legislation or an instrument of like nature (such as in Ordinance) cannot be challenged on any ‘concept or notion’, rather, the challenge must be rooted in some express provisions of the Constitution.

L. Nageswara Rao J., in his lead opinion, preliminarily observed that the scope of judicial review is the same for ordinances and ordinary legislations as the promulgation of ordinances is an exercise of legislative power by the President only.<sup>106</sup> He then reiterated the trite law that there are only two types of judicial review of ordinary legislation; ‘competence review’ i.e. violation of Articles 245 or 246 of the Constitution and Art. 13 review i.e., violation of provisions of Part III of the Constitution. While noting that judicial interpretation has read in ‘manifest arbitrariness’ as another ground under Art. 14 of the Constitution, there exists no other ground on which

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<sup>105</sup> *Madras Bar Association v. Union of India*, (2022) 12 SCC 455.

<sup>106</sup> *Id.* ¶ 43.

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ordinary legislation can be struck down.<sup>107</sup> While striking down the impugned provisions as improper attempts at legislative overruling, he construed ‘separation of powers’ as emergent from Art. 14.

S. Ravindra Bhat J. in his concurring opinion, resonated Rao J.’s understanding and read the ‘principles’ as “evident in the Constitution, but not clearly spelt out”.<sup>108</sup> He observed that in view of *DC Wadhwa*, *L. Chandra Kumar*, and *Ayodhya Acquisition* cases, among others, the contention of the respondent no longer deserves consideration.<sup>109</sup> The decisions cited by Bhat J. suffer from serious infirmities as regards their precedential value and interpretation, for reasons elaborated previously in this essay. It emanates from his opinion that his insistence lies in the propriety of testing ordinary legislation for violation of ‘separation of powers’ and not in undertaking a basic structure judicial review. Whereas his approach is limited to testing the efficacy of tribunals as ‘substitutes’ of the courts they seek to replace in the interests of the independence of the judiciary; his approach is least concerned about the 2021 Ordinance damaging or destroying the basic structure of the Constitution. Thus, Bhat J. in essence followed the multi-provisional approach of Rao J. *albeit* making references to the Doctrine where perhaps none were required.

This marks the end of the third section of the essay but not the saga, as the subsequently passed Tribunal Reforms Act, 2021, stands assailed by the Madras Bar before the Supreme Court.<sup>110</sup>

### CONCLUSION

The Basic Structure Doctrine has come a long way since its inception in *Kesavananda*, with its myriad interpretations and understandings. Debates revolving around its meaning, legitimacy, method of determination, standard of review, level of scrutiny, scope of application, and many other facets have attracted considerable judicial scrutiny and academic scholarship. This essay has attempted to highlight two distinctions to argue

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<sup>107</sup> *Id.* ¶ 44.

<sup>108</sup> *Id.* ¶ 73.

<sup>109</sup> *Id.* ¶ 81.

<sup>110</sup> *Madras Bar Association v. Union of India*, WP (C) No. 1018 of 2021 (S.C.) (Pending).

against the application of the basic structure review of ordinary legislation. The first distinction is between the ‘identity’ and the method of ‘identification’ of the Doctrine. Whereas the ‘identity’, *inter alia*, lends constitutional, sociological, and moral legitimacy to the Doctrine; the multi-provisional method of ‘identification’ better equips the courts and the scholar to determine what all can be included within the meaning of ‘basic features’.

The method of identification is an interpretative aid and not the identity itself. The judicial misconception of the ‘identity’ and conflation of the same with ‘identification’ has led to the present position where the Doctrine is essentially understood as a bunch of provisions of the Constitution, clubbed for convenience. As analysed in the ‘tribunalisation cases’ in the third section, the judge-made law has given a second identity to the Doctrine. There appears to be little or no articulation of the purpose and the basis on which the Doctrine has been extended to test the validity of ordinary legislation. Although it was possible to reconcile the earlier judgments of the twentieth century, as done in the second section, the task of reconciling the later judgments of the twenty-first century poses a newer set of challenges.

This lack of clarity necessitated the development of the second distinction: between the Doctrine and the ‘principles’ of the Constitution. The ‘tribunalisation’ judgements drew a false equivalence between the Doctrine and the principles of the Constitution emerging from interpretations of the Constitution. Although the Doctrine was initially developed as a limitation on the constituent powers, which excluded the traditional forms of judicial review, it is now being extensively invoked as a limitation on the ordinary legislative powers, which anyway expressly subjects itself to the constitutional compliance review. The perils of such an extension are apparent. It robs judicial review of its critical investigation in favour of the basic structure review, reducing it to a generic review devoid of rigorous scrutiny.

Apart from the practical difficulties, such extension inflicts a serious dent in the ‘identity’ of the Doctrine at a normative level. The sanctity of this judicially evolved doctrine that limited the unbridled constituent powers must be preserved by invoking it in the sphere of constitutional

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amendments only. While the extant debates often ask “Why not?” extend the Doctrine, this essay counters with a “Why even?”.